FOR ARGUMENT

Supreme Court, U.S.
FILED
JAN 7 2002
CLERK

(12)

No. 00-1214

In The

# Supreme Court of the United States

STATE OF ALABAMA,

*Petitioner,*

vs.

LEREED SHELTON,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of Alabama**

## RESPONDENT'S REPLY BRIEF TO BRIEF OF AMICUS CURIAE BY INVITATION OF THE COURT

WILLIAM H. MILLS
*Counsel of Record*
REDDEN, MILLS & CLARK
940 Regions Bank Building
417 North 20th Street
Birmingham, Alabama 35203
(205) 322-0457
*Attorney for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12 pp

# TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 1

CONCLUSION ..... 9

TABLE OF AUTHORITIES

Page

CASES

*Gagnon vs. Scarpelli*, 411 U.S. 778 (1973) .....4, 5, 6, 7

*Gideon vs. Wainwright*, 372 U.S. at 344 (1963) ..... 2

*Mayor vs. City of Chicago*, 404 U.S. 189 (1971)..... 8

*Nichols vs. United States*, 511 U.S. 738 (1994).....4, 7

*Powell vs. State*, 485 So.2d 379 (Ala. 1986) ..... 6

STATUTES

18 U.S.C. §§ 3563, 3565 ..... 6

ALA. CODE § 15-22-52 (1975)..... 6

ALA. CODE § 15-22-54 (1975)..... 6

ALA. CONST. § 6 (1901)..... 6

ALA. R. CRIM. P. 18.1(a) (1975)..... 6



## ARGUMENT

This brief is filed as a reply to the Brief of Amicus Curiae By Invitation of the Court, as allowed by the Court's order of October 18, 2001.

Amicus' brief begins with a brilliantly analytical and incisive description of the landscape of the problems presented by this case. However, when the brief undertakes to propose solutions to these problems with the argument that an uncounseled misdemeanant may be constitutionally incarcerated to serve a suspended sentence there are indications that, to vary a well-worn metaphor, it overlooks both the forest and the trees.

### A. *Argersinger* and *Scott* Mean What They Say In Expressing Constitutional Standards.

The first contention in Amicus' brief is that the Respondent has relied on an overly broad reading of *Argersinger* and *Scott*. This contention is illustrated by quoting a number of passages from *Argersinger* and *Scott*, including the following:

> [N]o person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial. *Argersinger*, 407 U.S. at 37.
>
> The denial of the assistance of counsel will preclude the imposition of a jail sentence. Id. at 38.
>
> But in those that *end up* in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary where one's liberty is in jeopardy. Id. at 40 (emphasis supplied).

Amicus' brief suggests that the Court did not really mean what it said when it wrote these words.

This contention, we submit, is unsound. It overlooks the fundamental purpose and goal of the Assistance of Counsel Clause of the Sixth Amendment and the decisions of this Court which have construed and applied it. It substitutes a short sighted, compartmentalized view of the right to counsel that turns a blind eye to reality and the true purpose of the Counsel Clause.

The *Argersinger* and *Scott* decisions are extensions of the *Powell-Johnson-Gideon* series of cases which had determined that, in the absence of waiver, counsel for persons accused of crimes is constitutionally required. This requirement is based on a recognition that our system of justice is an adversary system where the "guiding hand of counsel" is essential for a fair trial. See *Gideon vs. Wainwright*, 372 U.S. at 344 (1963). The significance of a fair trial, and its expected and hoped-for outcome, is that no innocent person will be convicted and punished for a crime. As the Court has recognized, the assistance of counsel is the best guarantee humanly possible that a fair trial will occur and that the innocent will not be convicted and punished. This is the goal of the Counsel Clause. The constitutionally operative time for counsel is at (and before) trial where guilt or innocence is determined. This is the concept the *Argersinger* and *Scott* cases were dealing with when the words quoted in Amicus' brief were written. They are not hollow words. They are profound statements of principles springing from the constitutional goal of preventing the conviction and imprisonment of the innocent.



The *Powell-Johnson-Gideon* series of cases established the ideal that in all criminal prosecutions a defendant have the benefit of counsel. The *Argersinger* and *Scott* cases were confronted with the issue of whether the ideal was an absolute mandate of the Constitution or whether the ideal should be tempered by practical considerations requiring some tradeoff between the ideal and the practical.

*Argersinger* and *Scott*, it seems, have already made the ultimate concession and reached the ultimate accommodation in response to that issue. That accommodation was that the Constitution can tolerate the possibility that an innocent person might be convicted in an uncounseled trial so long as the only punishment imposed is a monetary fine but that the Constitution cannot tolerate the possibility that an innocent person might be convicted in an uncounseled trial where the punishment imposed is incarceration, even of the slightest duration. This is what the *Argersinger* case meant when it said "no person, may be imprisoned for any offense . . . unless he was represented by counsel at his trial" and "the denial of the assistance of counsel will preclude the imposition of a jail sentence".

The principle that no uncounseled defendant may be imprisoned has no meaning if it does not apply to an uncounseled person incarcerated to serve a suspended sentence. Imprisonment is the same deprivation of liberty, which the Constitution will not tolerate as the result of an uncounseled trial, whether it commences immediately upon conviction or is delayed until probation is revoked.

The referenced quotations from the *Argersinger* and *Scott* opinions are not hyperbolic "throwaways". They are the product of a studied and deliberate effort which squeezed to the limit the constitutional tolerance for risks of conviction of the innocent. The conclusion is that imprisonment is not a tolerable risk. Amicus' argument seeks to expand the risk. It is inconsistent with both the language of *Argersinger* and *Scott* and the principles and precedents on which they rest, and should be rejected.

### B. Conviction And Sentencing To A Suspended Sentence And Probation And Revocation Of Probation And Imposition Of The Suspended Sentence Are Not Separate Proceedings.

Amicus' brief argues that a separate determination should be made at each proceeding as to the constitutional requirements for counsel, relying on *Nichols vs. United States*, 511 U.S. 738 (1994) and *Gagnon vs. Scarpelli*, 411 U.S. 778 (1973). The attempt to compare *Nichols* and *Gagnon* to this case is an attempt to compare "incomparables". In *Nichols* two crimes were committed. Each warranted punishment. The first crime and the second crime are legitimately separate proceedings, and it is not illogical that a wall be built between them and each prosecution be separately considered, as *Nichols* did. The same is not true of probation revocation and imposition of a suspended sentence. It is the same prosecution and the same sentence for the same offense. The reimposed suspended sentence is incarceration for the original conviction. There is no first crime and second crime to be separated and separately considered.



*Gagnon* dealt with a different issue altogether, the right to counsel at probation revocation hearings. The right to counsel at a probation revocation hearing is not closely akin to the right to counsel at an original trial. At a probation revocation hearing guilt has already been established. It is the guilt determination stage where the guiding hand of counsel mandated by the Sixth Amendment operates ("Assistance of Counsel in his defence"). The right of counsel at probation revocation hearings, as Amicus' brief advocates at pages 23-24, is beyond the scope of this case.

### C. *Argersinger* And *Scott* Dealt With The Threat Of Incarceration Faced By An Untried Accused, Not A Convicted Misdemeanant.

The argument made under II-C of Amicus' brief is that a suspended sentence and probation are only a threat of incarceration, which the *Argersinger* and *Scott* cases rejected as a basis for appointment of counsel. This argument overlooks the facts of those cases and the issues raised and the contentions presented in them. The issue in both cases was counsel at trial, where guilt is determined. A contention in both cases was that an untried misdemeanor defendant charged with an offense for which a jail sentence was an authorized penalty faced a threat of imprisonment and should be appointed counsel. It was this threat of imprisonment, not a suspended sentence after an adjudication of guilt, that the *Argersinger* and *Scott* cases rejected as a predicate for appointing counsel.

The threat of imprisonment facing an untried accused is far different from the threat of imprisonment facing a convicted misdemeanant who has received a suspended sentence. After conviction and the imposition of a suspended sentence it is too late to afford counsel for the guilt determining process, the trial. The threat of imprisonment of an untried accused will materialize only if guilt is established beyond a reasonable doubt in a trial process where there are numerous safeguards to protect the innocent. There may be a right to jury trial, as there would have been in the Respondent's case. See ALA. CONST. § 6 (1901); ALA. R. CRIM. P. 18.1(a) (1975). Not so with a convicted misdemeanant who has received a suspended sentence and probation. Probation can be revoked for any number of reasons other than the conviction for a later committed offense. See, e.g., 18 U.S.C. §§ 3563, 3565; ALA. CODE §§ 15-22-52, 15-22-54 (1975). Proof of a probation violation need not be beyond a reasonable doubt. See, e.g., *Powell vs. State*, 485 So.2d 379, 380 (Ala. 1986). There is no jury trial. The right of counsel at a probation revocation hearing is not assured. See *Gagnon vs. Scarpelli, supra*. Consequently, the attempt to compare the threat of imprisonment facing an accused and the threat of imprisonment facing a convicted misdemeanant with a suspended sentence is not an equal comparison.



### D. *Nichols* And *Gagnon* Are Not Analogous To This Case

Amicus' brief argues, with putative reliance on *Nichols* and *Gagnon*, that incarceration to serve a suspended sentence following probation revocation is the product of a separate proceeding from the proceeding in which the suspended sentence was imposed. As previously discussed, this specious comparison and this attempt to fragment the same case into independent components does not serve the Sixth Amendment's purpose of preventing the conviction and incarceration of the innocent. Revocation of probation and incarceration to serve a previously suspended sentence of someone denied counsel at trial is incarceration of one not afforded the guiding hand of counsel when his guilt was determined. Such a person "ends up" incarcerated only because he received a suspended sentence at an uncounseled trial. Had such a person not been convicted at an uncounseled trial he or she would not "end up" being incarcerated to serve this sentence purely because of the conduct which resulted in probation revocation. This is incarceration of a person found guilty in an uncounseled trial, and no strained argument can separate this incarceration from the uncounseled trial.

### E. Practical Considerations Do Not Justify Denial Of Constitutional Rights.

The argument that only a small percentage of misdemeanants with suspended sentences end up being actually incarcerated (a premise which is somewhat lacking in a factual basis) misses the point of the precedents which

have dealt with the Counsel Clause. The undeniable message of these cases is that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial" (406 U.S. at 37) and that "the denial of the assistance of counsel will preclude the imposition of a jail sentence" (407 U.S. at 38). It makes no exceptions. As previously discussed, the *Argersinger* and *Scott* cases apparently have firmly decided that the Constitution will not tolerate any imprisonment of uncounseled defendants, regardless of the number and regardless of the costs.

The argument that the costs of providing counsel will be burdensome to States is an argument that has been rejected. See *Mayor vs. City of Chicago*, 404 U.S. 189, 147-48 (1971). The brief of Amici Texas et al. seems to suggest that most States already supply counsel in cases where a suspended sentence could be imposed, so few states may be affected. In these few States judges trying misdemeanor cases for which a jail sentence is an authorized penalty are already required by *Argersinger* to make a pre-trial determination about whether a jail sentence will be imposed. No additional judicial effort will be required to include suspended sentences in the thought and decision making process that must be made in every such misdemeanor case at the present time. In the absence of data to support it, the argument of an intolerable financial burden should be rejected as a reason for denying a basic right.



## CONCLUSION

For the reasons discussed, Respondent requests the Court to deny the petition.

Respectfully Submitted,

WILLIAM H. MILLS
REDDEN, MILLS & CLARK
940 Regions Bank Building
417 North 20th Street
Birmingham, Alabama 35203
(205) 322-0457

*Attorney for Respondent*